United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-1495

Docket No. 76-1495

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B
P/S

UNITED STATES OF AMERICA,

Appellee,

-against-

10/27/77

SAVERIO CARRARA, MICHAEL DE LUCA, ANTHONY DI MATTEO, BARIO MASCITTI, JAMES V. NAPOLI, SR., JAMES NAPOLI, JR., EUGENE SCAFIDI, SABATO VIGORITO, and ROBERT VOULO,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PETITION OF DEFENDANTS-APPELLANTS

JAMES V. NAPOLI, SR., JAMES NAPOLI, JR., SABATO VIGORITO, SAVERIO CARRARA, EUGENE SCAFIDI, MICHAEL DE LUCA AND ROBERT VOULO

FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

UNITED STATES OF AMERICA, :

Appellee, :

-against- :

SAVERIO CARRARA, MICHAEL DE LUCA, :
ANTHONY DI MATTEO, BARIO MASCITTI,
JAMES V. NAPOLI, SR., JAMES :
NAPOLI, JR., EUGENE SCAFIDI,
SABATO VIGORITO, and ROBERT VOULO, :

Appellants. :

- -X

PETITION OF DEFENDANTS-APPELLANTS
JAMES V. NAPOLI, SR., JAMES NAPOLI, JR.,
SABATO VIGORITO, SAVERIO CARRARA, EUGENE
SCAFIDI, MICHAEL DE LUCA AND ROBERT VOULO

FOR REHEARING WITH SUGGESTION FOR
REHEARING IN BANC

PRELIMINARY STATEMENT

The Panel, after five months of careful deliberations, filed three separate opinions, including a dissent.

The majority held in two opinions that once investigators have obtained an order, issued pursuant to Title III of the Ommibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 et seq. ("Title III"), authorizing them to intercept oral communications, they have implicitly been given discretion to enter private premises repeatedly to install, move, maintain and remove their electronic spying devices, notwithstanding that (a) Title III (and its legislative history) is completely silent on the subject of the court's

authority to decree such entries and (b) the order does not authorize entry. The Panel decision conflicts with constitutional holdings of other circuits on this issue which the Government has characterized as being "of the utmost importance to the administration of Title III" (Government's motion for extension of time to file its brief, p.2 ¶17).

The majority completely overlooked the fact that the F.B.I. made an entry when no Title III order was in effect, for the purpose of recharging batteries on its then-inoperative devices which had been left in place after the expiration of the HiWay I order. This entry was made pursuant to an order secured from a district judge, who, the government admitted, was not presented with the sworn showing of probable cause commanded by the Fourth Amendment. Without this entry the government would not have secured any evidence pursuant to the second order directed at the HiWay Lounge ("HiWay II"), which formed the bulk of its evidence against the defendants in what the majority of the panel characterized as "the principal count", which is the only count on which the appellants were convicted.*

STATEMENT OF FACTS

A total of eleven Title III orders authorizing electronic surveillance for at least 80 days were issued in this gambling investigation. Five were directed at an apartment believed to be a policy bank ("Apartment 309").** Three additional orders were directed at the HiWay Lounge (the "HiWay"). The orders, respectively HiWay I, II, and III, produced substantially all of the evidence which was introduced in support of the "principal count". The evi-

*Scafidi and Voulo were also convicted on the first substantive count.

**These eavesdroppings are dealt with particularity by defendant-appellant Bario Mascitti. We adopt his arguments.

dence pursuant to HiWay III was suppressed because of the government's admitted violation of Title III's sealing requirement. The bulk of the evidence used in support of the conviction came from HiWay II.

Although each of the Title III orders was silent with respect to the question of whether the government might enter to install, move, maintain, and remove the devices, government agents acting on their own authority made at least five entries for these purposes.

On only one occasion was there any semblance of anticedent judicial approval for an entry. Such approval came by way of a curious order issued after HiWay I had expired and before the Special Attorney received permission to apply for HiWay II. The batteries on the bugs had failed and the devices were inoperative. Accordingly, the Special Attorney sought and obtained an order from a district judge allowing the F.B.I. to enter that night in order to recharge the batteries. It is undisputed that: (1) the order was not a valid Title III order; (2) the district judge was never presented with sworn testimony or affidavits establishing probable cause for the warrant, as required by the Fourth Amendment; and (3) without this entry the bugs would not have produced any evidence during HiWay II.

Judge Mishler denied defendants' motions to suppress predicated, inter alia, on these entries. He held that the Title III orders gave the government investigators implicit authority to enter whenever necessary to effectuate the purposes of said orders. The majority of the Panel agreed with Judge Mishler.

With respect to the one entry order, Judge Mishler held that while this was not a Title III order, it was in the nature of a search warrant and was supported by probable cause. Judge Mishler overlooked the fact that the government had admitted that it had failed to provide the issuing judge with any sworn showing of probable cause as commanded by the Fourth Amendment. The majority of the Panel never addressed this issue, which, provides an independent basis for reversal.

REASONS FOR GRANTING REHEARING AND ARGUMENT

1. The majority decision to the effect that the Title III order implies authority to break and enter repeatedly, to install, move, maintain and remove the devices, is at war with the holdings or rationale of the three other circuits to have addressed the problem. Application of the United States, ___ F.2d___ (4th Cir. Dept. No. 77-1238, dec'd Sept. 20, 1977) 22 Cr. L. Rept'r 2025 (Oct. 12, 1977);* United States v. Ford, 353 F.2d 146 (D.C. Cir. 1977); United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976), cert. denied, ____ U.S. ____, 50 L. Ed.2d 759 (1977).

The majority recognized that Ford, supra, decided shortly before this appeal was argued, was squarely in conflict on constitutional and statutory grounds with its decision. The majority failed to note, however, that after being denied rehearing and rehearing in banc, the government elected not to apply for certiorari. While not controlling, the government's determination not to seek further review, at a time when it knew of the pendancy of this appeal, must be recognized as a acquiescence in the holding and rationale of Ford.

*The Panel was provided with a copy of the district court's decision at the time the instant appeal was argued.

Application of the United States, reported the day before the decision was filed in the instant case, squarely and unanimously rejects this panel's decision.

> "Permission to surreptitiously enter private premises cannot therefore be implied from a valid Title III order sanctioning only interception of oral communications." 22 Cr. L. Rept'r 2026.

There the Fourth Circuit was confronted with a refusal by a district judge to authorize electronic surveillance by surreptitious forcible entry against gambling suspects, although the district judge specifically found that the government's application satisfied all of the prerequisites of Title III, and additionally showed that the only method of installing the devices in the suspects' business premises was by a surreptitious forcible entry. The district judge denied the order because of the entry request, which he held had to satisfy standards even more strict than those required to intercept oral communications. The Fourth Circuit held that the district judge "correctly bifurcated his considerations of the applications for permission to eavesdrop and to enter" (Ibid.), but that his test was impermissibly high as to the entry request, and, accordingly, directed issuance of the order authorizing breaking and entry. The court further held:

> "The district court was thus correct insofar as it subjected the request for authorization of surreptitious entry to separate Fourth Amendment consideration. Since in the absence of exigent circumstances the Fourth Amendment commands compliance with the warrant requirement, we would normally countenance secret entry by federal agents for the purpose of installing, maintaining, or removing listening devices only under the following conditions: (1) where, as here, the district judge to whom the interception application is made is apprized of the planned entry; (2)

> the judge finds, as he did here, that the use of the device and the surreptitious entry incident to its installation and use provide the only effective means available to the Government to conduct its investigation; and (3) only where the judge specifically sanctions such an entry in a manner that does not offend the substantive commands of the Fourth Amendment." (Ibid.)

The majority here apparently overlooked the fact that in Agrusa, supra, the split panel of the Eighth Circuit upheld the eavesdropping only (a) because the premises were business premises rather than a home, a distinction squarely rejected by the Supreme Court shortly thereafter in G.M. Leasing Corp. v. United States, _____ U.S. _____, 50 L. Ed.2d 530 (1977), and (b) because there was an order which specifically authorized the investigators surreptitiously to break and enter to install their devices 541 F.2d at 701. The Agrusa majority refused to pass upon any facts less favorable to the government Id. at 696, fn 13. This issue split the entire Eighth Circuit 4 to 4, with the four judges who dissented from the denial of in banc consideration stating,

> "We entertain great doubt of the validity of a judicial order which authorizes such a break-in. We tend to agree with the views of Judge Lay [expressed in his dissent from the panel in which he stated such searches were unreasonable per se and should be suppressed. Id. at 702-04]...." Id. at 704.

2. The decision of the majority here erroneously denigrates the intellect and abilities of our district judges, ignores the government's own views in this area and invites our busy district judges to serve as little more than rubber stamps.

As Judge Smith's dissent so aptly concluded (Slip Op. p. 6260):

"The lack of warrants for the entries is not

> the only defect in the procedures used here. The delays in sealing and lack of timely progress reports to the judges, as well as the unauthorized reentries indicate a wide disregard for the intent of the Congress that the use of this dangerous tool be strictly supervised. We have been willing to excuse an occasional slip-up on timing as my brothers have pointed out. The perhaps inevitable result has been a progressive weakening of the safeguards. I would agree with the District of Columbia Circuit in Ford and draw the line here.

Because of the importance of the issue we expand upon Judge Smith's opinion.

Dealing with the constitutional requirement for antecedent judicial consent to the entries, the majority simply observed that, since the issuing judges knew that the bugs had to be installed, they had implicitly consented to entry for that purpose. (Slip Op. 6248-49). The majority overlooked the very real possibility that the district judge could have concluded the bugs would be installed by a patron or informant while properly on the premises. A reading of the affidavit in support of the HiWay I order certainly suggested that possibility, since it referred to informants relating conversations with Napoli, Sr. in the HiWay. (Appellants' Joint Appendix A. 287-89). Additionally, Judge Smith's dissent, pointing out a few of the alternatives to physical entry, further discredits the propriety of the majority's conclusion that the issuing judge impliedly authorized entry (Slip Op. 6259-60). Since there was no basis to find implied consent for the unanticipated additional entries to move, maintain and remove the bugs, the majority approved these entries because they resulted in "[n]o greater incursion into the appellants' privacy...." (Slip Op. p. 6250). The majority overlooked the Supereme Court's statement in Chimel v. California, 395 U.S. 752, 767 fn. 12 (1969):

> "* * * we can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require."

Moreover, the majority's view strikes at the heart of the long established constitutional requirement for antecedent judicial approval for physical entry of private places. See, e.g., Osborn v. United States, 385 U.S. 323, 327-31, particularly fn.6 (1966), in which each entry to record face to face conversations received formal antecedent judicial approval based upon a sworn showing of probable cause. The implication of judicial approval, assuming arguendo the court had that power,* conflicts with the view of this Court in Application of the United States, 538 F.2d 956, 961-63 (2d Cir. 1976), cert. granted (the "Pen Register Case") and of the Ninth Circuit in Application of the United States, 427 F.2d 639, 643 (9th Cir. 1970) (the "Wiretap Case") in closely analogous situations.

The real question, however, is not whether the issuing judges implicitly intended to invest the F.B.I. with discretion to enter (whenever the agents believed it to be necessary), but whether such implied consent meets constitutional muster. Unfortunately, the majority really never analyzed the issue, placing principal reliance on the statute's silence (Slip Op. 6249-50). The issue was treated in great depth in Ford, supra, 553 F.2d. at 152-170. In Ford, suppression was granted because the provision in that Title III order,

*The four dissenters in Agrusa were obviously of the view that the courts lacked such power. 541 F.2d at 704. And the unanimous opinion in Ford left that issue open. 353 F.2d at 170. Napoli, Sr. maintains that the courts were not invested with the power by Title III and that the statute's silence compels the conclusion that any inherent power should not be used. Napoli, Sr.'s Brief pp. 27-33. This issue need not be resolved in order to reverse.

which specifically authorized entry, was deemed unconstitutionally over-broad in that it invested the government agents with complete discretion to enter to install, move, maintain and remove the bugs. Such a broad grant of authority was held to be the abdication of constitutionally imposed judicial responsibilities.

Indicative of the tone of the panel's split decision was the majority's brushing aside of the government's admitted failure to have supplied court-ordered progress reports (Slip Op. p.6252) and its delays in sealing based upon the flimsy excuse of trial preparation (Ibid.). Appellate approval of such improper and sloppy conduct can only result in a denigration of our precious liberties. The dangers of electronic surveillence has twice evoked the concern of this Court and its demand for strict judicial supervision. United States v. Marion, 535 F.2d. 697, 698 (2d Cir. 1976, emphasis added) ("Title III imposes detailed and specific restrictions upon both the interception of wire and oral communications, and the subsequent use of the fruits of such interceptions, in an effort to ensure careful judicial scrutiny throughout.") United States v. Gigante, 538 F.2d. 502, 503 (2d Cir. 1976) ("...Title III...prescribed specific and detailed procedures to ensure careful judicial scrutiny of the conduct of electronic surveillance...."). The majority's decision is at odds not only with the spirit of previous decisions of this Court, but of the Supreme Court as well, e.g., Katz v. United States, 389 U.S. 347 (1967) and Berger v. New York, 388 U.S. 41 (1967).

Neither Katz nor Berger, upon which Title III was based, were even cited by Judge Moore. Although both cases were cited in Judge Gurfein's concurring opinion, Slip Op. p.6225, he did not address the Supreme Court's cri-

tical language. In reaching the conclusion that a trespass could be authorized, the Berger Court placed great reliance upon the "safeguards" established in Osborn v. United States, 385 U.S. 323 (1966), which the Berger Court described as follows (388 U.S. at 57, emphasis added):

> "Under it [the Osborn order authorizing the use of a body recorder in face to face conversations with the defendant] the officer could not search unauthorized areas....In addition, this order authorized one limited intrusion....And.... a new order was issued when the officer sought to resume the search and probable cause was shown for the succeeding one."

In Katz the Supreme Court held that electronic surveillance could be conducted (assuming the existence of congressional authority) provided that the magistrate, who gave antecedent approval, was "clearly apprised of the precise intrusion it would entail...." 389 U.S. at 354. (emphasis added). The majority decision, which would allow numerous physical invasions by the police, limited solely by their own prosecutive judgments, plainly conflicts with Katz.

Judge Moore would have the district judges shrink from their constitutional duties on the ground that "judges should [not] be presumed to have such familiarity with the installation of such devices or the premises in which they are to be installed..." and that "[i]t would be most unseemly for the courts to invade the province of law enforcement agencies...." (Slip Op. p.6249). The short answer to Judge Moore's conclusion is that the government has admitted that it can work out the precise entry questions with the court in advance without impairing its investigative needs. Application of the United States, supra 22 Cr. L. Rept'r 2026; Napoli Sr's brief, pp. 26-27. The Ford Court completely rejected Judge Moore's conclusion because

> "it would lead not only to abrogation of the warrant requirement, but also to the unacceptable conclusion that courts are inherently incapable of reviewing the reasonableness of police action taken with the intent to install or maintain eavesdropping devices." 553 F.2d. at 162 (footnote omitted).

3. The majority ignored the fact that substantially all of the evidence admitted on the HiWay count was secured as a result of an illegal entry.

After the HiWay I order expired, but before the Attorney General authorized application for the HiWay II order, the special attorney secured an order from a district judge authorizing the F.B.I. to enter to recharge the batteries of their inoperative bugs which had been left in place.* It is undisputed that this order did not comply with Title III. The government also admitted that it offered no sworn testimony or affidavit to meet the Fourth Amendment's requirement for the issuance of a search warrant (see brief of Napoli, Sr. pp. 5-8, 37-43 for a full discussion of this issue, which was completely overlooked by the majority). It is beyond dispute that without this entry the bugs would not have produced any evidence. It cannot be questioned but that this evidence was the principal evidence upon which appellants were convicted.

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*The order provided in its entirety:

> "Pursuant to the statement of facts related to this Court by Fred Barlow, Special Attorney (to be supplemented be [sic] affidavit May 3, 1972), and pursuant to Judge Bartels' Order of April 12, 1973, authorizing interception of oral communication at the HiWay Lounge, 362 Metropolitan Avenue, Brooklyn, N.Y., it is ordered that the FBI is authorized to enter the subject premises the night of May 2-3, 1973, to effect any extension of Judge Bartels' Order of April 12, 1973." (A 303).

4. Both members of the majority recognize that their decision conflicts with the other circuits which have ruled upon these important constitutional and statutory issues. The government has characterized this issue as being of "utmost importance to the administration of Title III". Judge Gurfein specifically invited Congress and the Supreme Court to resolve this dispute. Before the case reaches that level, however, it seems appropriate that this entire Court speak.

5. Petitioners adhere to the other arguments raised in their briefs and join in any other petitions for review that may be filed by their co-appellants.

CONCLUSION

The Court should grant rehearing or rehearing in banc and reverse the decision below with instructions to suppress all fruits of electronic surveillance.

Respectfully submitted,

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